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The Politics of Rights of Nature

Strategies for Building a More Sustainable Future

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THE EVOLUTION OF RIGHTS OF NATURE THROUGH THE ECUADORIAN COURTS

For over a decade, environmental activists have celebrated the audacious move to include rights of Nature (RoN) in the 2008 Constitution of the Republic of Ecuador. As we discussed in chapter 3, Ecuador's constitution presents *buen vivir* ("good living," the Spanish translation for the Andean Indigenous concept *sumak kawsay*) as a set of rights for humans, communities, and Nature and portrays RoN as a tool for achieving an alternative model of sustainable development that challenges dominant neoliberal approaches. This chapter examines the evolution of RoN in Ecuador, the world's first country to recognize Nature's constitutional rights.[1] In doing so it illustrates the politics of implementation in RoN systems that follow the Nature's rights model. Given Ecuador's influence on international RoN mobilization, we argue that explaining variation in the application of Ecuador's RoN laws over time has value for understanding the strategies, pathways, and processes through which emerging global counternorms strengthen.

Ecuador's RoN provisions resulted from the activism of a diverse array of Indigenous, environmental, and leftist organizations who ascribe different meanings to *buen vivir* (Aidoo et al. 2017; Gudynas 2015; Radcliffe 2012).[2] *Buen vivir* therefore represents a variety of discursive and practice-related "platforms" for considering and practicing alternative visions of development (Gudynas 2011). Consequently, its implementation has

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varied widely, from natural resource extraction in biologically sensitive protected areas in order to finance poverty reduction policies (e.g., Yasuní National Park), to supporting communities' and Nature's rights against agro-industry and extractivism. By analyzing the dynamics of contestation surrounding the application of RoN in Ecuador, this chapter provides new insight into the struggles to construct post-neoliberal development within the global market system.

Contestation over RoN quickly escalated after the constitution's signing in 2008. These rights immediately conflicted with the Ecuadorian government's plans to expand large-scale mining and oil extraction to finance development projects. Numerous lawsuits were filed to protect Nature's rights, including protecting them from economic development projects. Given the state's plan to fuel economic growth through increased extractivism, even in fragile and protected ecological areas, Ecuador illustrates the difficulties of implementing RoN. Herein we present a conceptual framework for understanding the tools and pathways through which Ecuador's RoN are applied in practice and the reasons why these rights are upheld in some cases and not others.

We describe below five legal tools used to implement RoN and then compare thirty-eight attempts to apply these tools through one of four pathways: (1) norm-driven civil society pressure, (2) instrumental government and private action, (3) bureaucratic institutionalization, and (4) professional interpretation by judges. We use this framework to explore key questions with global ramifications: Given that Ecuador's constitutional RoN has not eliminated new large-scale extractive projects, does it still matter, and if so, how? And what lessons does Ecuador's experience have for those working to implement RoN legislation elsewhere?

Our findings, based on case analysis from 2008 to 2020, reveal some unexpected pathways of influence and suggest that the pathways channeling efforts to apply RoN influence the prospects for success. Contrary to our expectations (based on the norms literature), civil society pressure was the least successful pathway in the early stages of RoN development (2009–2015). We will describe how civil society efforts became more successful in later stages (2016–2020) following the strengthening of RoN jurisprudence in the courts. By 2019, civil society had become the most prolific and successful pathway. But initially RoN activists faced two

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main obstacles: (1) the politicization that inevitably occurs around norm contests, and (2) judges' initial lack of knowledge about how to interpret RoN. Activists lost early high-profile lawsuits; before 2018, they succeeded only by working "below the radar" (Gash 2015) on local cases that did not directly challenge the state's development agenda. Lower-level judges became more familiar with constitutional RoN provisions and began to apply them in their rulings, creating a foundation that allowed RoN jurisprudence to develop.

Despite initial failure inside the courts, we argue that highly politicized civil society pressure outside the courts contributed indirectly to judicial momentum in the early years of RoN application. Antimining activists used Ecuador's RoN constitutional provisions as a tool for mobilizing society and shaming the government. As a result, the government invoked RoN to justify and legitimize its development agenda. While the state often invoked RoN instrumentally (producing positions that appear hypocritical to many), it invariably won. The result was to build precedent and raise awareness of RoN among judges, setting the stage for civil society's subsequent success in the courts, including cases in which RoN was used to block mining and oil projects. These latter cases were also facilitated by judicial reforms widely seen as enhancing courts' independence from the executive branch.

One of our most interesting findings is the significant role of judges in the strengthening and evolution of RoN jurisprudence inside Ecuador. Our interviews suggest this has occurred not because judges are RoN advocates but because most feel a professional responsibility to interpret and apply the constitution in its entirety. Early on, a handful of judges knowledgeable about RoN applied it unilaterally in their sentencing in cases where neither claimants nor defendants had invoked it. Again, these cases tended to be lower-profile cases related to local infrastructure or agro-industry, as in the biodigester case discussed herein. When the state later invoked RoN in high-profile cases related to mining it always won, further expanding and strengthening RoN jurisprudence. This early application of RoN between 2009 and 2015 created a foundation of RoN jurisprudence on which judges have based later rulings.

Over the course of the decade, judicial thinking in Ecuadorian courts gradually and naturally evolved as they were forced to apply the legal

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principles to an increasing number of situations. By 2019, judges were applying RoN as a tool for sustainable development, including using it to ban state-sanctioned mining operations—something unheard of in the early years of Ecuadorian RoN. This dramatic change highlights the strengthening and evolution of RoN jurisprudence by Ecuadorian judges.

As RoN jurisprudence strengthened in the courts, local communities and subnational governments began to invoke RoN as a tool for preventing oil extraction and mining in their territories. This strategy has received some traction in the courts, as shown in the Constitutional Court of Ecuador's opinion on a request by Azuay Province to hold a referendum to ban mining. This linking of community rights and RoN is another way in which Ecuador's experience has broader relevance. Local control and application of RoN, as we note throughout this book, is a tension point for communities, and particularly those in Ecuador and the United States that are opposing extractive processes at subnational levels. Ecuadorian judges are leading the way in rethinking the relationship between community rights, RoN, and citizen participation in decisions regarding natural resources amid the onset of climate change.

POSTCONSTITUTION POLITICS CHANNELING RIGHTS OF NATURE THROUGH THE COURTS

Once Ecuador's constitution passed in 2008, attention turned to creating the secondary laws and institutions needed to give form to constitutional principles. President Rafael Correa immediately launched a public campaign to pass a mining law that greatly expanded existing mining operations and initiated new sites. Correa argued that the state could ensure socially and environmentally responsible mining practices. Moreover, profits from mining and oil extraction were necessary to develop a post-fossil-fuel energy sector, reduce poverty, and expand access to education, health care, and other public goods. For Ecuador's government, these goals constituted *buen vivir*.

Indigenous and environmental activists fiercely criticized the law, saying it violated both RoN and the constitutional rights of Indigenous communities to prior consultation. They accused the government of co-opting and twisting the meaning of *buen vivir*. Correa responded by

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calling them "childish environmentalists" (quoted in Dosh 2009, 22). Passage of the Mining Law in January 2009 prompted tens of thousands of Indigenous, community-rights, and environmental activists to protest nationwide. Tensions reached a boiling point in September 2009 after the government proposed a water law that opponents argued similarly violated constitutional RoN and Indigenous rights. Ecuador's government cracked down, and by 2011 had arrested nearly two hundred Indigenous leaders, charged with terrorism for protesting mining activities (*EFE* 2011). The government also closed several organizations leading the protests, including the Development Council of Indigenous Nationalities and Peoples of Ecuador and the environmental nongovernmental organizations (NGOs) Acción Ecológica and Fundación Pachamama.[3]

Given the state's priority on exploiting natural resources to fuel social development, the government postponed creating the secondary laws and institutions needed to strengthen and give form to constitutional RoN principles.[4] Environmental lawyers and activists drafted a secondary RoN law, but decided not to submit it to the National Assembly given the hostile political context and their fear that this would provide an opportunity for legislators to restrict the constitution's RoN provisions.[5] Consequently, early efforts to apply RoN in Ecuador occurred in a highly politicized context, with relatively little institutional structure beyond general constitutional principles.

As of early 2021, Ecuador's constitutional RoN provisions have still not been fleshed out adequately through secondary laws. Two Ecuadorian laws mention RoN: the 2014 Penal Code and the 2018 Environmental Code. But in both situations, the concept of RoN is not fully developed. For example, the Penal Code does not delineate the standards for determining a crime against RoN, but rather gives discretion to the Ministry of Environment. The 2018 Environmental Code is similarly weak in that it does not give content to RoN, nor does it regulate RoN—to the point that article 6 says that the ministry will set technical guidelines on ecosystem cycles.

Essentially, the Environmental Code gives the Ministry of Environment the authority to regulate a constitutional right, something the constitution says the legislature must do. Nevertheless, application has been deferred to executive-appointed ministry regulators who have failed to establish detailed regulations. Consequently, it has fallen primarily to

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judges to fill in the gaps of RoN legal and normative applications—an unusual situation given Ecuador's civil law system. Despite the civil law system, the lack of clear secondary RoN laws greatly empowered judges and prompted them to consider judicial precedent, spurring the evolution of RoN jurisprudence. As we show herein, activists strategically used the law as a tool, and judges gradually but steadily strengthened and expanded the enforcement of RoN, with important consequences for the future of sustainable development in Ecuador.

ECUADOR'S COURT AND LEGAL SYSTEMS

Ecuador's court system is divided into two parts: the ordinary judicial system, which addresses civil and criminal law, and the jurisdictional system, which addresses constitutional law. Most proceedings begin in local-level courts called first-instance courts. Provincial Courts are second instance courts that serve as appellate courts for first-instance matters. Each Provincial Court is internally divided into specialized chambers for different branches of law (e.g., civil law and criminal law). The National Court of Justice is the highest body of the judiciary and serves as the main judicial institution that hears cases of cassation and revision of appeals for the ordinary judicial system. The Constitutional Court is the highest court in the jurisdictional system and is the final arbiter on constitutional questions, including the interpretation of RoN and its relationship to other constitutional rights.

The Defensoría del Pueblo is a government ombudsman's office designed to protect human rights and RoN. Communities and individuals can report RoN violations, and the Defensoría del Pueblo will investigate and document the case. In 2015 the government ordered all allegations of RoN violations to be channeled through the Defensoría del Pueblo. This decision is controversial, since the Defensoría del Pueblo has no legal enforcement authority and the constitution states that any citizen can represent Nature in court. Various cases in this chapter originated with the Defensoría del Pueblo.

Some cases in this study are from the Galapagos Islands, an Ecuadorian province with special legal status. Article 258 of Ecuador's constitution

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specifies the province's role in protecting the principles of patrimonial conservation through the concept of *buen vivir* / *sumak kawsay*. Article 3 of the Special Law of the Province of Galapagos outlines principles for governing the islands. These include "an equilibrium among the society, the economy, and nature; cautionary measures to limit risks; respect for the rights of nature; restoration in cases of damage; and citizen participation" (Republic of Ecuador 2015). Article 20 of the Special Law also defines the unique role of the Galapagos National Park, which represents the state and Nature in all lawsuits dealing with RoN in criminal and civil matters. Within this park system is a marine protected area (MPA), extending 40 mi outside the islands. This MPA has another set of special laws that surround it, including those prohibiting long line and commercial fishing.

Finally, the Galapagos Islands have a revised governing structure created in 2014 that includes a government council composed of Ecuador's president, a technical secretary, the minister of environment, the minister of tourism, the minister of agriculture and fishing, the director of national planning, the mayors of each Galapagos canton, and a permanent representative of the president from the rural Galapagos cantons. Prior to 2014 the conservation sector (comprising various environmental NGOs and scientific teams) had one vote on policy making in the MPA. While this is no longer the case, this group played a key role in some cases described herein.

LEGAL TOOLS FOR PROTECTING RIGHTS OF NATURE

We identified five legal tools through which RoN is applied in Ecuador. The first are secondary laws, including the 2014 Penal Code and 2018 Environmental Code, which do not sufficiently establish standards for enforcing RoN. Consequently, RoN in Ecuador is primarily applied through three types of lawsuits (constituting three of the five "tools"). The first two involve lawsuits seeking protection of RoN guaranteed in the constitution and the Organic Law of Jurisdictional Guarantees and Constitutional Control. These constitutional lawsuits (processed through civil and constitutional courts) ask that damaged ecosystems be restored (a form of restitution for Nature) and/or that preventive action be taken

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to avert expected future violations. The most common constitutional lawsuits are those requesting "protective action" to uphold RoN. Other constitutional lawsuits seek to overturn laws and executive orders that violate the constitution's RoN clauses.

Criminal lawsuits provide a fourth legal tool that became possible in 2014 with the passage of Ecuador's Penal Code. Chapter 4 of the Penal Code specifies various "crimes against the environment, nature or Pachamama," including crimes against biodiversity and against natural resources, including water, soil, and air. Criminal lawsuits seek punishment for such crimes and are processed through criminal courts. Unlike constitutional lawsuits, which seek restorative justice by restoring ecosystems, criminal lawsuits seek punishment of guilty parties.

The fifth tool is not a lawsuit, but rather administrative action by a government agency to uphold RoN. For example, the Ministry of Environment has invoked RoN to justify punitive action (e.g., fines, removal of licenses, and eviction of companies from ecological reserves) and restoration of damaged ecosystems. Its regulatory power has expanded since the 2018 Environmental Code was created.

CASES AND PATHWAYS

We identified thirty-eight cases where the above legal tools were used to try to protect RoN from 2008 to 2020. In several cases, lawsuits were combined with administrative action. Table 4.1 summarizes these cases and identifies whether or not RoN was successfully applied (i.e., a judge upheld RoN or the government implemented an administrative action to protect RoN). Of the thirty-eight cases, thirty-one efforts succeeded and seven failed.

Besides the legislative actions producing the two secondary RoN laws (the Penal Code and Environmental Code), we identified four remaining pathways for implementing RoN in Ecuador: (1) civil society pressure, (2) application by the juridical epistemic community (i.e., judges), (3) instrumental action by government and private corporations, and (4) bureaucratic institutionalization. These pathways differ not only by the type of actor but also by motivation. Civil society actors were motivated by

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Table 4.1 Ecuador's Rights of Nature cases 2008–2020

Pathway	# of Cases	Legal Tool	% Successful
Civil society (norm driven)	20	19 protective actions; 1 challenge to law's constitutionality	65% (13 of 20 cases)
Instrumental government and corporate action (interest driven)	5	4 protective actions; 1 criminal lawsuit	100% (5 of 5 cases)
Bureaucratic routine (rule driven)	8	8 administrative actions (6 combined with lawsuits—1 protective action; 5 criminal lawsuits)	100% (8 of 8 cases)
Juridical epistemic community (professional standards driven)	3	3 protective actions	100% (3 of 3 cases)
Legislative action	2	2 secondary laws (Penal and Environmental Codes)	100% (2 of 2 cases)
Total	38	2 secondary laws; 26 protective actions; 1 administrative action plus protective action; 5 administrative actions plus criminal lawsuits; 2 administrative actions only; 1 criminal lawsuit only; 1 challenge to constitutionality of a law	Protective actions, 77%; challenge to the constitutionality of a law, 0%; administrative actions,100%; criminal lawsuits, 100%; legislative action, 100%

normative principles and invoked these in their struggle to protect Nature. As one might expect, President Correa's office acted instrumentally, invoking RoN when it served its purpose and ignoring RoN when it challenged government policies. Consequently, government positions appear somewhat hypocritical, particularly on mining. We also identified an unexpected case where a private oil company invoked RoN to serve its purpose, further illustrating instrumental use by actors normally seen as hostile to RoN.

At other times, however, government agencies like the Ministry of Environment and Galapagos National Park invoked RoN to justify routine bureaucratic actions that predated RoN laws and which could have been

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justified through other regulations. This pathway is important because the incorporation of norms into routine bureaucratic policies and practices is thought to be crucial for norm adoption, since it leads to the internalization of norms through habituation. The incorporation of new norms like RoN into routine bureaucratic procedures can signal the beginning of a transition from the first stage of a norm's life cycle (emergence) to the internalization phase (Finnemore and Sikkink 1998). Some legal scholars note, however, that empowering the Ministry of Environment to develop regulations for constitutional rights like RoN can produce arbitrary and uneven application of such rights.[6]

Judges' actions were often neither normative nor instrumental, but rather rooted in the routine application of law. RoN jurisprudence is being developed in Ecuador by judges who did not identify as environmentalists in interviews (indeed, most expressed a lack of knowledge regarding RoN) and who did not invoke normative arguments regarding Nature in their rulings. Rather, they expressed a professional responsibility to interpret and apply constitutional law in its entirety to the best of their ability.

Of the thirty-eight RoN cases, twenty originated from civil society. All seven failed cases were civil society cases. Many of these were early civil society attempts to protect RoN in the first years after the constitution was adopted. During 2016–2020, however, twelve civil society cases were filed. Only two of those cases have failed to date. The remainder succeeded in lower courts, and appealed cases were upheld or are being considered by the Constitutional Court. These numbers demonstrate the sea change in Ecuador since 2008 and the strengthening of RoN norms as civil society and judges reflect on, learn, experiment with, and apply RoN. We analyze the forces behind this sea change in the case studies below.

The following five sections analyze these pathways and the interactions among them. We discuss each pathway in roughly the chronological order that they appear, acknowledging a great deal of overlap among the pathways. We analyze the civil society pathway in two parts, distinguishing between early and later attempts. We do so to highlight changes in civil society strategies in response to changing conditions and to better show how the interactions among the pathways create new opportunities for applying and strengthening RoN over time.

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NORM-DRIVEN CIVIL SOCIETY PRESSURE, PART 1: 2009–2015

Given the passage of constitutional RoN provisions in 2008, Indigenous movements and environmental NGOs were initially optimistic that Ecuador was turning away from extractivist-based development.[7] These hopes were dashed when the government passed the 2009 Mining Law and moved quickly to expand industrial mining. Eager to protect the gains they had made, civil society activists invoked the constitution's RoN provisions to challenge the government's extractivist development agenda through lawsuits for protective action.

Civil society launched eight RoN lawsuits between 2009 and 2015. Only three of these early lawsuits succeeded, and five failed. Two factors likely explain the failures and constitute the principle obstacles to implementing RoN in the initial years of its development. First, the contentious relationship between RoN activists and the Correa government meant some lawsuits were highly politicized. Ecuadorian legal scholars note that judicial sentences consequently focused on navigating the politicized environment rather than on implementing the specifics of the law.[8] Second, most lawyers and judges simply lacked knowledge of RoN and how to interpret it. The idea that individual and corporate property rights must be curtailed in some cases to uphold Nature's rights was not only foreign to most judges but ran counter to their legal training. As a result, judges in civil society lawsuits initially ruled that economic development activities are protected by individual rights (e.g., property rights, the right to work) that supersede Nature's rights.

THE CONDOR-MIRADOR LAWSUIT

The Condor-Mirador lawsuit illustrates the problems of politicization and early lack of knowledge. In 2010, Indigenous and environmental activists realized the political situation would not allow them to strengthen RoN through secondary laws. They therefore tried to strengthen RoN by establishing case precedent. After spending two years searching for the perfect case—a high-profile one involving a clear, unambiguous, large-scale violation—RoN activists decided on the Condor-Mirador open-pit mining project.

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In March 2012 the Ecuadorian government signed a contract with the Chinese-owned mining company Ecuacorriente to establish the country's first, large-scale, open-pit mining project in a sector of the Amazonian province Zamora-Chinchipe known as Condor-Mirador. The mining concessions cover 38 sq mi and will include an open-pit mine expected to measure 2.5 mi in diameter and 0.7 mi in depth (Sacher 2011, 6). The project's environmental impacts are particularly problematic because it exists in one of the most biodiverse areas of the planet, one that is home to several endangered endemic species, and particularly some amphibians that are close to extinction. The project is also located in the watersheds for two rivers used for irrigation and consumption and which constitute habitat for various animal and plant species.

The mining company's own environmental impact study acknowledged that the open-pit mine would cause impacts listed as RoN violations in the constitution. These include the total removal of ecosystems, including the habitats on which endangered endemic species rely, likely causing the extinction of one or more species (Thurber and Noboa 2010, PDF 374). Additionally, contaminating surface and groundwater with heavy metals and other toxins would be catastrophic for surrounding watershed ecosystems (Sacher 2011, 16–17). Article 73 of Ecuador's constitution explicitly requires the state to "apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and permanent alteration of natural cycles" (Republic of Ecuador 2008). Moreover, the constitution clearly establishes the precautionary principle; activities likely to produce these outcomes must be stopped and redesigned. RoN activists therefore saw Condor-Mirador as a promising case for creating RoN jurisprudence.

In January 2013 a collection of Indigenous movements, environmental and human rights NGOs, and communities near the mine jointly filed a constitutional lawsuit for protective action to the Twenty-Fifth Civil Court in Pichincha Province.[9] The defendants included Ecuacorriente and the Ministry of Non-Renewable Natural Resources for signing the mining contract, and the Ministry of Environment for granting an environmental license. The lawsuit alleged that these actions constituted RoN violations since scientific studies showed the mining project would likely produce environmental impacts explicitly prohibited in the constitution

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(e.g., destruction of whole ecosystems, extinction of species, and degradation of water ecosystems, which enjoy special protection due to water being a precondition for life).[10] The suit also noted articles in the constitution and the Organic Law of Jurisdictional Guarantees and Constitutional Control that require the state to take preventive action against potential RoN violations, even amid uncertainty. The suit asked the court to suspend the Condor-Mirador project and order a new environmental impact study that would address impacts on the project's drainage into watersheds.

The judge ruled that the Condor-Mirador project did not violate RoN for two principle reasons, both of which reflect questionable and controversial interpretations of the constitution's RoN clauses. First, the judge ruled that since the mining project would not affect a protected area, the environmental damage would not violate RoN.[11] Activists criticized this argument because the constitution clearly states that all Nature—not just Nature found in protected areas—has rights. The court essentially ruled that because the mining company received an environmental license, no RoN violation occurred (equating RoN with the normal environmental regulatory process). The judge also argued that civil society's efforts to protect Nature constituted a private goal, while Ecuacorriente (a private company) was acting in favor of a public interest—namely, development. Ruling that the public interest takes precedent over a private interest, the judge ruled against the claimants. Putting aside the perverse logic of this argument, it contradicts the constitutional principle that Nature's rights are both autonomous of societal interests and of equal value.

Civil society representatives appealed the decision in the Provincial Court of Pichincha but lost. They blamed their loss on a lack of judicial independence. Their allegation is supported by a 2010 memorandum circulated among judges by Alex Mera, President Correa's legal secretary. The memorandum decries the "illegitimate abuse of protective action provided for in the Constitution" to challenge public works projects, which "has meant a grave setback against placing the general interest over particular interests." Arguing that "this situation has meant an enormous opportunity cost for the country," the memorandum presents instructions from President Correa that any judge approving a preventive action against a state project must personally reimburse the state for "damages

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and harm" incurred as a result of suspending the project (Mera 2010, in possession of the authors). Government bureaucrats would determine the amount of damages owed.

Concluding that they would never get a fair ruling under the current government, RoN activists chose not to appeal the Condor-Mirador case to the Constitutional Court. Many RoN activists decided not to bring more lawsuits in Ecuador for fear of establishing negative jurisprudence that could weaken the gains made in the constitution. They focused instead on mobilizing support for RoN within Ecuadorian society.

Some Ecuadorian environmental lawyers disagree that the main problem is a lack of judicial independence.[12] Rather, they say most judges, especially in the early years of the new constitution, did not understand RoN and did not know how to interpret them or balance them against other constitutional rights. The lawsuit for protective action against a pine tree plantation in the *páramos* of Tangabana illustrates this problem.[13]

THE TANGABANA CASE

The Tangabana case relates to a 200-ha monoculture plantation established by the private company ERVIC with funding from Ecuador's Ministry of Agriculture, Livestock, Aquaculture, and Fisheries (through a reforestation program meant to increase carbon sequestration). ERVIC's owner, retired military captain Carlos Rhor Romeno, extended the plantation beyond his property into *páramos* collectively owned by a local Indigenous community. Community members were concerned because the *páramos* serve as the catchment area for their watershed. Pine trees are notorious for consuming a lot of water and known to seriously degrade the hydrological flow in *páramo* ecosystems. For this reason, Ecuador's Ministry of Environment prohibits reforestation projects in native *páramos*.[14] Community members turned to the environmental NGO Acción Ecológica for help. While the NGO feared bringing another suit after Condor-Mirador, it took a risk. Since government policy prioritized protecting *páramo* ecosystems, Acción Ecológica saw this as a chance to create positive RoN jurisprudence through a case that did not directly challenge the government's extractivist agenda and thus would sidestep the political conflicts associated with the agenda.

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In November 2014 a collection of RoN activists (represented by YASunidos Chimborazo and Acción Ecológica) and the community's pastorate filed a lawsuit for protective action in the Judicial Court of Colta (a canton in Chimborazo Province). The judge ruled against the claimants on procedural grounds. The ruling demonstrates the judge's lack of understanding of RoN. First, he noted that the claimants did not own the affected land (community members were not signatories to the suit due to fear of intimidation from ERVIC). The judge ruled that since the claimants could not prove that they themselves were harmed, they could not bring suit. He failed to understand that since RoN exists autonomously of human interest, article 71 of the Ecuadorian constitution allows any person to bring a suit on behalf of Nature, including those not personally affected by RoN violations. The judge also ruled that the claimants had not demonstrated an existing damage that needed to be repaired. This is, however, not necessary under the Organic Law of Jurisdictional Guarantees and Constitutional Control, which authorizes preventive action to protect RoN before harm is committed.

Finally, the judge ruled that evidence submitted by the claimants (e.g., affidavits and scientific studies showing the damage pine trees cause to *páramo* ecosystems) was invalid because it was not presented with the respective witness testimony, a process required in criminal lawsuits. Rather, the claimants' lawyers submitted the evidence with sworn affidavits, as permitted in constitutional lawsuits (which this one was) by the Organic Law of Jurisdictional Guarantees and Constitutional Control. According to the claimants' lawyer, ignorance of the different procedural requirements for different kinds of lawsuits is a common problem in small municipalities like Colta.[15] Such places often have a single "multicompetent judge" with general training to hear any kind of lawsuit. For practical reasons, such judges are often specialists in criminal suits and lack expertise in constitutional ones. This provides a significant obstacle in highly complex cases like constitutional RoN cases.

Acción Ecológica appealed the decision to the Provincial Court of Chimborazo. But the judge refused to consider new evidence, meaning Acción Ecológica could not submit the evidence of RoN violations that the first-instance judge had ruled inadmissible. Lacking the necessary evidence, the provincial judge ruled the claim inadmissible and denied the appeal. The

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claimants' lawyer, Pablo Piedra, lamented that "our constitutional rights were once again violated because of a procedural issue."[16] In September 2015 Piedra filed an appeal before the Constitutional Court, alleging a violation of due process. The Constitutional Court refused to hear the case and allowed the lower court ruling to stand.

THE VILCABAMBA RIVER CASE

Despite these failures, there are also successful cases of civil society lawsuits that similarly illustrate the importance of judicial knowledge and the politicization of cases. The first successful civil society RoN lawsuit was filed by two Americans, Nori Huddle and Richard Fredrick Wheeler, who own land along the Vilcabamba River in Loja Province. While widening a nearby road, Loja's provincial government discarded excavated material and construction debris into the river. Blockages altered the river's path and increased its flow, causing large floods that increased the risk of landslides, damaged local ecosystems, and reduced local landowners' access to land and water. Desperate to save their land, Huddle and Wheeler sued the provincial government on behalf of the Vilcabamba River. This constitutional lawsuit on behalf of Nature did not seek restitution to Huddle and Wheeler, but only the restoration of the river's natural ecosystem.

After losing in the first-instance court, Huddle and Wheeler appealed to the Provincial Court of Loja. In March 2011 the provincial court ruled in favor of the Vilcabamba River, making it the world's first successful RoN lawsuit. The judge's interpretation of RoN was likely helped by the fact that the case involved a relatively mundane issue like provincial road construction and not a more nationally politicized and controversial issue like mining.

At first the government of Loja resisted implementing the court's order to remedy the damage to the river. In March 2012 Huddle and Wheeler appealed to the Constitutional Court to enforce the order. In March 2018, the Constitutional Court issued a sentence confirming that Loja's government had finally complied with the Provincial Court order (Corte Constitucional del Ecuador 2018).

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PROFESSIONAL INTERPRETATION BY JUDGES

The Vilcabamba case shows that even in the first years of constitutional RoN there were judges who were aware of these new rights and began to think carefully about what it meant to apply them in practice. This is also demonstrated by the fact that a handful of judges began to unilaterally apply RoN in their sentencing even when lawsuits were not originally about RoN (i.e., when neither claimants nor defendants invoked it). They did so because of their professional desire and sense of obligation to correctly interpret constitutional law: the judges simply recognized that RoN is part of Ecuadorian law and that their professional standards required them to apply and interpret the law in its entirety. But just like early successful civil society lawsuits, this pathway occurred below the radar in low-level, less politicized cases involving agro-industry and infrastructure. Nevertheless, this pathway played an important role in establishing early precedent regarding RoN, laying the foundation for a more expansive RoN jurisprudence.

THE BIODIGESTER CASE

The first case illustrating this pathway began before the 2008 constitution codified RoN. In 1993, the agro-industrial company Procesadora Nacional de Alimentos CA (PRONACA) installed a large-scale pork processing plant in the canton Santo Domingo de los Colorados. Over fifteen years, PRONACA built forty factories in the canton that processed millions of pigs and chickens annually. Community members continually proclaimed the negative effects on the environment, human health, and the local economy; they accused PRONACA of human rights violations and appealed to the Ministries of Agriculture and Environment for help (Corte Constitucional del Ecuador 2009). After a decade of study, the Ministry of Environment determined that PRONACA was operating without proper legal permission. A 2003 Inter-Institutional Technical Commission report confirmed reduced quality of life for populations near the plant, including contaminated local rivers, severe odors, and decreased tourism. The National Council for Water Resources also found that PRONACA did not have legal permission to use subterranean water sources and ordered fines and proper permitting (Corte Constitucional del Ecuador 2009).

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Community members filed a lawsuit with the Nineteenth Civil Court in Pichincha Province, arguing that PRONACA's actions violated their constitutional rights to health and a safe and clean environment. They asked for a halt on six new biodigester machines that PRONACA was installing to process the release of methane gas caused by intensive pig farming. After losing in provincial court, the community appealed to the Constitutional Court of Ecuador, which issued its ruling in July 2009.

The Constitutional Court noted that "the principle of integrality or completeness dictates that in order to exercise true justice . . . it is necessary to look at all the elements of the case and the parties involved, one of them being Nature" (Corte Constitucional del Ecuador 2009). The court noted that the environmental impact of biodigestors depends on how well they are run, and that Nature's constitutional right to be restored to the ecological state it was in before PRONACA entered the province must be respected. Consequently, the court allowed the biodigesters to operate, but created a commission to audit and monitor the biodigesters to ensure proper water usage and waste management in order to protect the collective rights of communities and Nature (Corte Constitucional del Ecuador 2009). This ruling is significant not only for establishing RoN precedent but also because the court acknowledged its obligation to address RoN even when claimants do not invoke these rights. It also begins to establish connections between human environmental rights and RoN.

THE SANTA CRUZ ROAD CASE

Another case where judges unilaterally applied RoN in their sentences occurred in Santa Cruz, Galapagos. In 2012, eighteen citizens, primarily business owners, sued the municipal government to stop construction on Charles Darwin Avenue (a primary boulevard) during high tourist season, fearing it would hurt business. Their argument rested on the fact that the municipality lacked an environmental license for the project. The mayor argued that the municipality had the right to build the road quickly before the high tourist season, regardless of licensing procedure. While the claimants invoked procedural measures, Judge Benjamín Pineda Cordero applied RoN in his decision. He noted that the construction area constituted a species habitat, and the road crossed a migratory path for marine

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iguanas and other species. Invoking RoN (articles 71–73 of the constitution), Judge Pineda Cordero ordered that construction be suspended until the municipality obtained an environmental license based on an environmental impact assessment that would guarantee the protection of species habitat, particularly during migratory season.

This case is significant not only for the judge's unilateral application of RoN but also for placing Nature's constitutional rights over the rights of autonomous, decentralized municipalities. Citing the constitution's precautionary protection measures and the hierarchy of rights, the judge ruled that the court's duty to protect Nature took precedence over its duty to protect governments' ability to carry out public works (Pineda Cordero 2012). Equally significant, the judge cited the Vilcabamba case as precedent, suggesting that early cases brought by civil society contributed to his knowledge of RoN. It was another pathway, however—that is, instrumental action by government—that significantly raised the profile of RoN and put it on the radar of judges across the country.

INSTRUMENTAL GOVERNMENT AND CORPORATE ACTION

Somewhat ironically, early RoN jurisprudence in Ecuador was largely developed through government action. Thirteen of the thirty-eight RoN applications during 2008–2020 were initiated by the state (three of which were initiated by the Galapagos National Park), all successfully. Moreover, the state employed a variety of legal tools: constitutional lawsuits for protective action, criminal lawsuits, and administrative action. Sometimes these were motivated by instrumental policy considerations directed by President Correa, while other times agencies like the Ministry of Environment simply invoked RoN to justify routine administrative actions. Regardless, we argue that these actions strengthened RoN in Ecuador, perhaps unintentionally, by establishing precedent and raising the profile and awareness of RoN among judges. In this section we examine instrumental use of RoN by the government, as well as one oil company, to show how this greatly expanded and strengthened RoN jurisprudence. We also examine routine bureaucratic action in the following section.

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ILLEGAL MINING IN ESMERALDAS

The government's use of RoN to combat unauthorized mining illustrates instrumental state action. There has long been unauthorized, "artisanal" mining in provinces like Esmeraldas and Zamora-Chinchipe. When Ecuador's government decided to expand industrial mining, it initiated efforts to eliminate unauthorized mining. The desire to regulate all mining was undoubtedly one motivation. But the crackdown also responded to community appeals for state action to address the environmental damage caused by illegal mining. By 2010, various governmental and university reports showed that unauthorized mining had seriously degraded 140,000 ha of land and released high levels of toxins into water sources in the cantons Eloy Alfaro and San Lorenzo in Esmeraldas Province. Citing these reports, in May 2011 the Ministry of the Interior requested that the Twenty-Second Criminal Court of Pichincha approve preventive action. Citing articles 71–73 of the constitution, the request argued that the state's duty to protect RoN—in this case, the rights of water—justified extraordinary measures, including "the destruction of all items, devices, tools, and other utensils that constitute a serious danger to Nature" (Serrano Salgado 2011).

On May 20, 2011, the court approved the request and ordered the armed forces, the National Police of Ecuador, and other government agencies to collaborate in operations to control illegal mining to uphold RoN. That same day, President Correa issued Executive Decree 783, declaring a state of exception in San Lorenzo and Eloy Alfaro and ordering a military operation to combat mining in the cantons. The next day, nearly six hundred soldiers seized and destroyed more than two hundred pieces of heavy mining equipment, including those that local miners had rented from third parties (*El Universo* 2011). Over the next several years, similar operations were repeated in Esmeraldas and replicated in other provinces, including Morona Santiago, Napo, and Zamora-Chinchipe.

While the government's use of RoN to combat unauthorized mining may seem hypocritical given its refusal to acknowledge RoN in the Condor-Mirador case, instrumental state use of RoN has had longer-term consequences that strengthen RoN jurisprudence. For example, the state's action in Esmeraldas set the precedent that private property may be destroyed to protect RoN. This is now institutionalized in the

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country's 2014 Penal Code: title IV, chapter 4 identifies a series of crimes against Nature, and article 551 legalizes the destruction of private property to protect RoN against such crimes. While the original intention was to consolidate state control over mining, the law theoretically can now be used in other circumstances and introduces the idea that RoN takes precedence over property rights.

THE OIL PIPELINE CASE

Instrumental action can also be employed by the private sector. In 2013 the Crude Petroleum Pipeline Corporation of Ecuador (Oleoducto de Crudos Pesados, or OCP) had an oil spill in Esmeraldas Province, which impacted Carlos Alberto Hanze Moreno's property, cattle, and livelihood. The OCP immediately began a remediation and mitigation program approved by the Ministry of Environment to clean up the oil spill, which required the company to enter Hanze's property. Hanze blocked OCP access to his property in order to preserve evidence of the oil spill for a lawsuit seeking damages from the OCP. Citing RoN, the OCP filed for precautionary measures to be taken to enter Hanze's property to engage in cleanup and remediation. Those were granted, but Hanze appealed to the Criminal Tribunal of Esmeraldas, claiming he sought damages and did not want the company to enter until it settled on the indemnification.

In the lawsuit the OCP argued that RoN (in this case, water's right to not be polluted by the oil spill) involves the right to restoration, which is separate and distinct from an individual's right to indemnification. The OCP emphasized that "human beings do not own water, the water is the state's, it [water] has its own right" (Tribunal Segundo de Garantias Penales de Esmeraldas 2015, 4). In July 2013 the court ruled in favor of the OCP, acknowledging that Nature's right to restoration took precedence over an individual's right to indemnification.

This case is an excellent example of two aspects of RoN in Ecuador: (1) the use of a private corporation's instrumental action to protect RoN against an individual seeking damages from the company, and (2) the issues that emerge between collective RoN: that of protecting the water source in Esmeraldas for the population, and that of a private property owner. In this case, the court protected Nature's right to be restored through

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the Penal Code as a primary, constitutional responsibility and ruled that indemnification was secondary to RoN.

BUREAUCRATIC INSTITUTIONALIZATION

In contrast to President Correa's and the OCP's instrumental use of RoN, the Ministry of Environment and Galapagos National Park invoke RoN to justify routine administrative actions that are part of their institutional mission of environmental protection. In some cases, the Ministry of Environment unilaterally applies sanctions, like fines or the removal of environmental licenses for economic development projects determined to violate RoN. Other times, the Ministry and Galapagos National Park file criminal lawsuits against individual perpetrators. For example, in 2014 the ministry won two lawsuits against individuals who killed a condor and a jaguar, both endangered species. In justifying its actions the ministry cited article 73 of the constitution, which requires the state "to apply preventive and restrictive measures on activities that might lead to the extinction of species" (Republic of Ecuador 2008). In both criminal cases, the hunters were sentenced to prison. Below we examine two additional cases to show how RoN norms are being strengthened through bureaucratic routine.

SHARK FINNING IN THE GALAPAGOS

In the Galapagos Islands, where a special law and a marine protected area create unique criminal and civil codes for protecting this World Heritage Site, the Galapagos National Park has invoked RoN three times with the support of civil society. In July 2011, the Ecuadorian Coast Guard boarded the fishing vessel *Fer Mary* and six associated smaller crafts within the Galapagos Marine Reserve. They found 357 sharks without fins, representing 94 percent of the total catch in the storage area, and 1,335 shark hooks strung in a 30-mi line with specific characteristics used for capturing sharks. Sharks are a protected species, and fishing them inside the Galapagos Marine Reserve is an environmental crime under the Galapagos Law and the Penal Code of Ecuador (Sea Shepherd, n.d.). The problem is that it is very hard to prosecute under this law, as fishermen often

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claim they caught the sharks outside of Galapagos waters and accidentally drifted into Galapagos territory. RoN laws overcome this obstacle by making shark fishing illegal regardless of where the sharks are caught.

In September 2011, pressured by members in the conservation sector, the Galapagos District Attorney's Office and Galapagos National Park filed a criminal lawsuit against the *Fer Mary* captain and crew for crimes against Nature. The Galapagos judge claimed he was not competent to hear the case and moved it to Guayaquil, on Ecuador's mainland. In interviews, members of the park and government community commented that the judge felt threatened and that it was difficult for him to choose a "fish over a human's ability to feed his family and continue a career he has been doing over a lifetime."[17] Aside from delaying the case, the decision meant that the suspects were released from detention and the next hearing took place 982 km away from the crime scene. The *Fer Mary*, however, remained impounded in the Galapagos.

The case was transferred to Guayaquil and awaited trial. Proceedings began in May 2015 and in July 2015 the court ruled in favor of the sharks. Judge Fernando Franco Fernando sentenced the captain of the *Fer Mary* to two years in prison and the crewmembers to one year each. The verdict also ordered confiscation of the six accompanying motor launches, as well as the destruction of the *Fer Mary*. In his verdict the judge cited the constitution's articles 71–73 related to RoN (Noveno Tribunal de Garantias Penales del Guayas 2015). This marked the first conviction of an environmental crime in fourteen years of Galapagos law and set a precedent for sanctioning shark finning and other crimes against Nature in the Galapagos.

THE CAYAPAS SHRIMPER CASE

The Cayapas shrimper case shows how the Ministry of Environment's incorporation of RoN into its bureaucratic routine is slowly strengthening RoN jurisprudence such that it challenges vested economic interests. Ecuador is Latin America's largest shrimp producer, and shrimpers are a powerful interest group. The expansion of shrimp farms in Esmeraldas Province has destroyed much of its traditional mangrove forests. In 1995 the government established the Cayapas Ecological Reserve to protect some remaining mangroves. Even so, forty-two shrimp companies

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already operating in the area were allowed to stay within the reserve. This exacerbated conflict between the shrimp companies and local communities who relied on the mangrove forests for their sustenance. The government did little until 2008.

In 2008, President Correa issued Executive Decree 1391, which regulated shrimp farmers and made possible their removal from protected areas. Charged with enforcing protected areas, the Ministry of Environment removed dozens of shrimp companies from three ecological reserves, including Cayapas, between 2010 and 2012. In 2011, one shrimp farmer, Manuel de los Santos Meza Macías, sued for a protective action to stop the ministry's administrative action to remove him. At the hearing, Meza argued that "the economic interest of an individual takes precedence over Nature," and the judge agreed (Corte Constitucional del Ecuador 2015). Citing protections of private property (in art. 66, no. 26, and art. 32 of the constitution), the judge ruled that the Ministry of Environment's effort to remove Meza's shrimp company constituted an infringement on constitutional rights to property and to work.

After losing its appeal in the Provincial Court, the Ministry of Environment appealed to the Constitutional Court, arguing that the lower court's rulings were unconstitutional since they violated the constitution's RoN clauses. In its appeal the ministry argued that it "violated the constitution" for "the judge to place the economic interest of an individual above that of Nature . . . since the environmental legislation that governs us is oriented around preventing violations of the rights of Nature." The ministry asked the Constitutional Court to rule on this "to establish a precedent that permits us to exercise fully the respect for Nature and for *buen vivir*, as issues like these concern the whole community and are . . . nationally relevant" (Corte Constitucional del Ecuador 2015).

On May 20, 2015, the Constitutional Court ruled that RoN and *buen vivir* are central to the constitution and, therefore, RoN is transversal (e.g., art. 83, no. 6 and art. 395, no. 2). This means that RoN affects all other rights, including property rights. The court acknowledged that this reflects "a biocentric vision that prioritizes Nature in contrast to the classic anthropocentric conception in which the human being is the center and measure of all things, and where Nature was considered a mere provider of

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resources" (Corte Constitucional del Ecuador 2015). It ruled that by not guaranteeing RoN, the lower court rulings violated the constitutional right of due process, and it overturned the lower court sentences and ordered the case to be retried in the Provincial Court, but this time taking RoN into consideration.

Given the government's frustration with RoN being used to challenge its extractivist agenda, it is ironic that the state has been an influential force for strengthening RoN in Ecuador, succeeding in each of its twelve efforts to apply RoN. While the government often invoked RoN for instrumental purposes, the result was to build precedent and raise the profile and awareness of RoN among judges. And it did so in a relatively short period of time. Seven of the nine RoN lawsuits (and one administrative action) levied by the state occurred in 2014–2016. In hindsight, one can see this as a turning point in the politics of RoN in Ecuador.

NORM-DRIVEN CIVIL SOCIETY PRESSURE, PART 2: 2016–2020

Before 2016, civil society pressure was the least successful pathway for applying RoN. As noted above, only three of eight attempts succeeded. Those that succeeded did so by working below the radar on low-profile, depoliticized cases mostly involving local agricultural practices and infrastructure projects. This trend continued during 2016–2018, with civil society winning two RoN cases involving an infrastructure project in the city of Alamor and a pig farm in the canton of Mera.

Up to this point, environmental and Indigenous movements that had initially hoped the constitutional RoN provisions would be a tool for challenging the state's extractivist development agenda had stopped invoking RoN in lawsuits because they did not see it as a useful strategy.[18] This changed in 2019; in that year alone, civil society groups submitted nine lawsuits invoking RoN. Many were high-profile cases filed by Indigenous and environmental activists seeking to protect their communities and water sources from mining. In total, this second phase of civil society pressure involved twelve lawsuits, with all but two of them succeeding. What explains this renewed surge by civil society and their new success?

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A WINDOW OF OPPORTUNITY OPENS

We argue that part of the explanation involves the greater awareness among judges and growing precedent produced as a result of state action and environmental lawyers working below the radar. But equally important, Ecuador's political context shifted dramatically in 2017 when Lenín Moreno Garcés was elected president, replacing Rafael Correa. Moreno had been Correa's vice president and the Alianza Pais presidential candidate. But soon after taking office, Moreno split with Correa and used corruption charges to purge key Correa supporters from state institutions (De la Torre 2018; Wolff 2018). These efforts caused a split within Alianza Pais, causing the party to lose its legislative majority and forcing the government to rely on changing majorities (De la Torre 2018). While Moreno has continued to pursue an economic development strategy centered on mining and oil extraction, his election has influenced the evolution of RoN in Ecuador in one important way: by producing a judicial system widely perceived as more independent.

In February 2018 Moreno held a national referendum that proposed seven constitutional amendments. Most were clearly designed to reduce Correa's influence (Ramírez 2018). Voters overwhelmingly voted to name a new, temporary Council of Citizens' Participation and Social Control (CCPSC) empowered to evaluate all officials running Ecuador's accountability institutions. As Carlos De la Torre (2018, 83) notes, "the 2008 Constitution had created the CCPSC in order to ensure transparency and give citizens another voice in governance. In practice, [it] was stacked with Correa appointees" who named oversight officials loyal to Correa. The referendum allowed Moreno to name a transitional CCPSC from lists of nominees submitted by civil society.

In August 2018, the transitional CCPSC dismissed all nine judges of the Constitutional Court, citing a lack of independence and conflicts of interest that benefited the executive power (*Telesur* 2018). The CCPSC then established a new system for selecting judges that was designed to be more transparent and based on merit rather than political influence (*El Comercio* 2018). The new Constitutional Court, which was established in January 2019, is widely seen as professional and independent from the executive branch. According to Yaku Pérez Guartambel, an Indigenous leader and presidential candidate, and self-described "water defender,"

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the court's newfound independence has allowed legal victories for RoN and Indigenous activists that would have been impossible under Correa (Bermúdez Liévano 2019). In the following sections we discuss several cases that illustrate civil society's changed strategies and how this impacts the evolution of RoN jurisprudence in the courts.

THE RIO BLANCO CASE

After the loss over the Condor-Mirador mine in 2013, Indigenous communities continued to struggle against mining, but did so by invoking collective rights under articles 56 and 57 (rights of communities, peoples, and nationalities) in the 2008 constitution. In 2018, however, they began to combine arguments about collective rights with RoN. In one such case, Indigenous communities in Molleturo, Azuay Province, sued a Chinese mining company to protect the Rio Blanco. The Rio Blanco mine, located at 3,800 m above sea level, was part of former President Correa's development plan for the country in the early 2000s; 5,700 ha were leased to international corporations within and around the Cajas National Park in the Azuay Province. This is a large water catchment area, rich with lakes, primary forest, high levels of biodiversity, and high-altitude Andean *páramo* known for its significant role in the region's hydrology. Molleturo is also a protected forest area in which Ecuagoldmining South America S.A. planned to remove eight hundred tons of rock per day over seven years to create an underground gold and silver mine estimated to produce US$90 million in profits for the company (Sala de lo Civil y Mercantíl de la Corte Provincial del Azuay 2018).

The basis of the case was the failure to provide prior consultation of communities (per art. 57.7 of the constitution) tied to International Labor Organization's Convention 169 regarding the rights of Indigenous and tribal communities. But the Indigenous community members who brought this case also alleged violations of RoN under article 71 of the constitution. In their arguments, they emphasized the connection between RoN and Indigenous rights. Members of Molleturo cited polluted water and dry land that could no longer sustain traditional, Indigenous agricultural lifestyles. They also cited the violence of extraction that was brought to their community, including intimidation by the mining company and

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the police against the Indigenous community of San Felipe de Molleturo. Yaku Pérez Guartambel described how children could not run and play near the mining company and that some had changed schools to a different town out of fear (Sala de lo Civil y Mercantíl de la Corte Provincial del Azuay 2018).

In 2018, the communities of Molleturo won in both the first-instance court and the appeals court. "It seemed impossible to stop a mine with so many millions at stake," said Yaku Pérez Guartambel in an interview with Manuela Picq (2018b).[19] Before the trial, Pérez Guartambel led a peaceful protest against the mine with other water protectors. They were sequestered and violently attacked for over eight hours before they were released.[20] Given the violence surrounding the case, a court win was not only a welcome salve to the community but a sign to other water protectors around the world that collective rights and movements can succeed.

Ordering protective actions and a cease of all mining activities in the Rio Blanco community, judges cited their defense of Nature and its imminent threat from mining in this case (Sala de lo Civil y Mercantíl de la Corte Provincial del Azuay 2018). Additionally, the judges cited President Moreno's Decree 229 of 2017, which called for a "new nonextractivist economic model as part of the Indigenous cosmovision of *sumak kawsay* / *buen vivir* that implies harmony between people and nature" (Moreno Garcés 2017). In this light the judges noted the need to expand the protection of Nature to ban extractive mining in protected areas, intangible zones of Indigenous peoples living in isolation, and population centers. They ruled that the people of Molleturo demonstrated that Nature's integral system and its maintenance and regeneration had been directly affected (Sala de lo Civil y Mercantíl de la Corte Provincial del Azuay 2018).

THE COFÁN SINANGOE CASE

The Cofán Indigenous group of Ecuador, like their neighbors in Azuay, are fighting extractive mining industries. This group of Cofán are located in the Sinangoe area of the Amazonian province of Sucumbios, along the tributary banks of the Aguarico River, close to the Cayambe Coca National Park. The area in question covers 125 sq mi and is home to the Cofán and Chingual Rivers, as well as endangered species like the

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spectacle bear and the mountain tapir. It ranks among the most biodiverse regions in the world.

In 2018, with the assistance of global partners Amazon Frontlines and the Indigenous Ceibo Alliance, the Cofán collected an archive of evidence of the detrimental impacts of gold mining on their community and the living things within in it (Hill 2018). There were over twenty mining concessions operating along their riverbank community with authorization from the Ministry of Mines and thirty-two more permits pending (Paz Cardona 2019). Scientists note the use of cyanide in the mining process along the river but cannot yet confirm the exact quantities.

Like their counterparts in Azuay, the Cofán sued to stop the mining operations and integrated RoN into arguments about Indigenous rights of prior consultation. The Cofán won in both the first-instance court and on appeal. Ecuador's Provincial Court of Sucumbios found that prior informed consultation and RoN were both violated. The court canceled all fifty-two mining concessions that had been granted or were being processed for the 125 sq mi of Cofán territory, and it prohibited the granting of new mining concessions. Moreover, the court ordered the government to repair the environmental damage caused by the mining operations (Corte Provincial de Sucumbios 2018).

The Provincial Court ruling began to form a legal basis for connecting Indigenous rights and RoN. Citing the International Labor Organization's Convention 169, the court ruled that prior consultation must be done in a culturally appropriate way, meeting standards of interculturality. This means it must be done in a way that is consistent with the cosmovision of local Indigenous communities. The judges noted that the Cofán cosmovision does not have a word for Nature (in the abstract), but rather for forest, and that word implies an integration of the water and all living things inside of it. They explicitly recognized the cosmovision of Indigenous peoples and their lands, or Pachamama, as a "living organism and the human as one of her creatures . . . thus intimately tied to the phenomena of nature" (Corte Provincial de Sucumbios 2018).

In short, the ruling provides a legal basis for treating RoN and Indigenous rights as interwoven to create a set of "biocultural rights" (Bavikatte, Sanjay, and Bennett 2015; Chen and Gilmore 2015). The court recognized the integral "rights of territory and culture" that establish "the state's

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obligation to protect the special relationship of Indigenous peoples with their territories and the territories themselves, not just as a source of survival, but also an essential part of the way of life, culture, and spirituality, the essence of the community" (Corte Provincial de Sucumbios 2018). The judges explicitly recognized RoN in the constitution various times as a primary reason for the ruling, stating, "Article 71 is very clear that Nature reproduces life and this integral existence has the right to be respected and maintained and its vital cycles regenerated . . . which is a basic criteria and fundamental for the judges that this undoubtable principle—pro nature . . . be applied" (Corte Provincial de Sucumbios 2018).

The court justified its ruling by citing a number of domestic and international cases as precedent, showing how RoN jurisprudence in Ecuador is evolving in response to advancements in both Ecuadorian courts and those abroad (Corte Provincial de Sucumbios 2018). The judges cited a 2015 ruling in Ecuador regarding an oil spill by Chevron as a precedent for the pro-Nature principle. Aligning the constitution's RoN articles 71–74 on the global level, they also cite the Inter-American Commission on Human Rights' 2017 ruling on the inextricable tie of human rights and Nature. Notably, the court cited the Colombian Constitutional Court's 2016 decision recognizing the Atrato River as a legal person with rights, which was similarly rooted in an argument about biocultural rights (detailed in chapter 8). Like its counterpart in Colombia's Rio Atrato case, Ecuador's Provincial Court of Sucumbios ordered the provincial and municipal governments to work together to confirm the closing of the mining concessions in order to guarantee the sacred places of the Cofán (Corte Provincial de Sucumbios 2018, 29).

The idea of biocultural rights was further strengthened in Ecuador by a similar 2019 ruling by Ecuador's Provincial Court of Pastaza, which combined Indigenous rights and RoN arguments to prohibit oil extraction in over 800,000 ha of Waorani territory in the Amazonian Basin (Corte Provincial de Pastaza 2019a).

THE PIATUA RIVER CASE

While the aforementioned cases show how RoN jurisprudence is evolving to frame RoN as inextricably intertwined with human environmental

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and cultural rights, another set of cases show how Ecuadorian courts are beginning to differentiate between environmental permits and RoN. This has important implications for thinking about the relationship between RoN and sustainable development. Conventional wisdom among lawyers and judges has been that to meet international standards of sustainable development one simply needs to follow traditional environmental law and procedures, like conducting environmental impact assessments, making sure environmental licenses and permits are issued, and so forth. Before 2019, Ecuadorian courts typically said that when these procedures of traditional environmental law are followed, RoN is not violated. This was, for example, the logic of the ruling in the Condor-Mirador case. Yet in 2019 two courts departed from this thinking by ruling that RoN can be violated even if environmental impact assessments were conducted and environmental licenses were granted. The implication is that RoN implies a standard of sustainable development beyond the conventional international definition of meeting environmental procedural requirements.

One such case involved the Piatua River, which was given a concession by the Ministry of Energy and Non-Renewable Natural Resources to an electric company, the Compañía de Generacion Electrica San Francisco, for forty years in 2017. The Ministry of Environment approved environmental permitting in 2018. The Kichwa communities of Santa Clara, in Pastaza Province, along with the Confederation of Indigenous Nationalities of the Ecuadorian Amazon (Confederación de las Nacionalidades Indígenas de la Amazonia Ecuatoriana, or CONAIE) and the Ecuadorian Ombudsman's Office (the Defensoría del Pueblo), brought suit against these government entities and the electric company for denying the river's rights, as well as the communities' rights as a collective territory and their right of free and prior consultation.

In September 2019 the Provincial Court of Pastaza ruled that both RoN and community rights had been violated despite the provision of an environmental impact assessment and permitting that followed the law. Because of the concession, the Piatua River's flow had been disrupted significantly to less than 10 percent of its original flow, threatening the river's ability to maintain its vital cycles and endangering flora and fauna of the area. This environmental degradation impacted the community's way of life, customs, spiritual traditions, economic viability, and ecotourism.

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The court reviewed the mitigation impacts in the environmental impact assessment, yet argued that the Ministry of Environment could not violate article 71 of the constitution, which "provides the right to respect the integral existence, maintenance, and regeneration of vital cycles, functions and evolutionary processes" of natural ecosystems (Corte Provincial de Pastaza 2019b). The court noted that natural resources can only be used when RoN is protected: "always and when vital cycles are respected and nothing impacts their existence" (Corte Provincial de Pastaza 2019b).

This ruling, and a similar one regarding road construction in Gualaceo canton (Corte Municipal de Gualaceo 2019), suggest an evolution of RoN normative development in the Ecuadorian courts. In both cases the courts found that conventional environmental law and regulatory processes were not sufficient justification for approving development projects that violate RoN. These rulings expand the use of RoN as a standard for sustainable development beyond the conventional international definition of meeting environmental legal and procedural requirements.

In July 2020 the Constitutional Court of Ecuador selected the Piatua case to create binding jurisprudence regarding the relationship between environmental permits and RoN, and in general the role of environmental permits in protecting Nature (the ruling was pending at the time of writing). As we will see in chapter 7, the Piatua River case has implications for lawsuits in Pennsylvania and elsewhere that argue that environmental procedure is insufficient for sustainable development. This case begins to lay the legal groundwork for arguments that sustainable development must adopt a holistic and regenerative approach, recognizing the vital cycles and integration of community and Nature.

THE CITIZEN REFERENDUM AGAINST MINING IN AZUAY

As noted in the aforementioned Rio Blanco case, Indigenous and other civil society activists in Azuay Province have been highly active in working to prevent mining in order to protect regional water sources. In 2019, Indigenous leader and water protector Yaku Pérez Guartambel was elected prefect of Azuay Province. In March 2019, he held a referendum vote on whether to allow mining in the town of Girón, where the important

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Quimsacocha watershed is located. Nearly 87 percent of citizens voted to ban mining. The national government rejected the referendum, saying that only it had the competency to decide issues of natural resource extraction.

Pérez Guartambel submitted a request to the Constitutional Court of Ecuador to consider the issue of whether subnational governments can hold a referendum to decide whether or not to allow mining in their territory. Constitutionally, this is a case about citizen participation rather than RoN. It is a question of competing constitutional rights: the right of citizen participation versus the right of the state to control authority over mining. Yet RoN formed part of the reasoning of the Constitutional Court's ruling.

The court rejected the referendum petition on procedural grounds because the questions were not written in the proper form, essentially lacking clarity (one of the criteria for constitutional compliance). The court emphasized, however, that the main substantive issue of the request—whether a national issue like mining could be subject to popular consultation (giving local governments and communities the right to a referendum in regard to mining)—could be considered by the court. This is because there is a legitimate question of constitutional rights regarding citizen participation, which the court stated are linked to environmental rights, human rights, and RoN. Specifically, the court cited the right of *buen vivir* and article 395, which "guarantees active participation of communities and nationalities affected by any activity that generates environmental impacts" (Corte Constitucional del Ecuador 2019a). In short, the Constitutional Court said that it would consider the issue, but that Pérez Guartambel would need to resubmit a petition that was worded properly to meet constitutional standards.

This judicial ruling and its reasoning are important for two reasons. First, they raise the possibility that national issues with authority vested in central government could be subject to citizen participation and popular consultation (referendum) at the local level. This is essentially the same question faced by community rights activists in the United States who are fighting to protect local water sources from extractive industries, as we will see in chapter 7. Ecuador's Constitutional Court ruled in favor of the referendum, challenging conventional wisdom among constitutional lawyers

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that such local referenda are not constitutionally possible.[21] It is another indicator of normative change underway.

Equally surprising is that the Constitutional Court based its reasoning regarding citizen participation in part on the logic of RoN. It took this occasion to state that the exploitation of nonrenewable resources must be done in a way consistent with RoN, creating another legal avenue for strengthening RoN jurisprudence. The court's explanation and reasoning is an illustration of the normative change happening in the Ecuadorian courts and the reframing of sustainable development based on RoN and *buen vivir*. Similar to the Pennsylvania cases discussed in chapters 3 and 7, Azuay prefect Yaku Pérez Guartambel argued that the province has the right to protect Nature. Around the world, local communities and governments are beginning to challenge traditional notions of sovereignty as a result of their struggle to protect ecosystems impacted by multinational corporations supported by national governments. The cases of Azuay and others in this book illustrate the tensions of RoN at multiple scales and the continued fight to protect local peoples and their environments.

THE DULCEPAMBA RIVER CASE

By mid-2019 RoN had evolved in the court system to the extent that the Constitutional Court decided it needed to create binding jurisprudence on RoN, formally establishing the relationship between RoN and various human rights, particularly in development policy. As a vehicle for establishing this binding jurisprudence, the court selected a case involving the diversion of the Dulcepamba River to create the Hidrotambo Electric Dam.

The lawsuit was brought by the San Pablo de Amali community in Bolivar Province against the Electric Control and Regulation Agency, the Secretariat of Water, the Ministry of Environment, and the government of Bolívar. The Dulcepamba River used to be 160 m away from the community, but after the diversion it is now only 20 m away. Consequently, there was flooding of the community in 2015. The overflowing of the riverbanks impacted the community by causing loss of human life, destroying infrastructure, and moving the legally recognized flood zone to include the community (which was not previously in the flood zone).

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From 2015 to 2019, the community repeatedly asked all relevant authorities to take action to prevent future floods. The authorities did inspections and concluded that Hidrotambo, the private company that received the water concession, needed to take various actions, including constructing containing walls to protect the community. Over the four years the company built one containing wall, and the quality of the construction was very poor. Frustrated and tired of the lack of action, the community went to the constitutional court system. The first- and second-instant courts declined to hear the case, saying it was not a constitutional issue but a legal one and should go through the normal court system. The issue was never analyzed or resolved.

Consequently, the community went to the Constitutional Court and requested an extraordinary action of protection. In response, the court said it was going to analyze the case and also select this case to establish binding jurisprudence over the relation between the impacts, effects, and standards that have to be applied regarding the exploitation of nonrenewable resources, RoN, and collective rights. The court noted the national relevance of this case for similar projects that "provide basic services to the citizens and income to the State, notwithstanding the conflicts they present for collective rights and RoN as a result of the omission of effective public policies to prevent risks and guarantee the protection of rights" (Corte Constitutional del Ecuador 2019b). The court had not yet ruled at the time of this writing. Yet the consideration of tensions resulting from development projects among collective rights, RoN, and state economic development will have important implications for future development projects in the country and will provide insights for other states considering RoN legislation.

CHAPTER SUMMARY

This chapter shows the advancement in Ecuadorian judges' applications of RoN since the 2008 constitution was adopted. The 2018–2019 rulings in favor of Indigenous communities and the rights of their ecosystems highlight the impact civil society organizations have had in propelling the evolution and advancement of RoN jurisprudence in Ecuador. This is

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particularly true for Indigenous communities that claim an integral link with their territories as a part of a singular living organism in which all beings live. This link is cited by the courts as biocultural rights, an idea previously cited in the Atrato River case in Colombia, illustrating norm diffusion and learning within court systems (Corte Provincial de Sucumbios 2018).

But civil society success has come only recently, after RoN precedent was already established and the Constitutional Court was restructured to appear more independent. Before 2018 most civil society efforts failed, including all high-profile lawsuits challenging state-led development projects. Early on, some analysts dismissed Ecuador's RoN laws as merely "cheap talk" on the part of the government, which presumably had no intention of enforcing RoN when it conflicted with its interests (Snyder and Vinjamuri 2004). Yet a comparison of the full range of RoN cases suggests that Ecuador's constitutional RoN articles do matter in the sense that RoN activists are using them as tools to strengthen RoN jurisprudence and norms in a way that are having real impacts, including the nullification of mining concessions. To do so, however, RoN advocates had to overcome three obstacles: (1) the politicization that inevitably occurs around norm contests; (2) the lack of secondary laws that parse out more detailed elements of RoN's application; and (3) initial lack of knowledge among judges regarding how to interpret RoN.

RoN was politicized from the outset because Indigenous and environmental activists used it to challenge the government's economic development strategy. One important consequence was that the secondary laws and institutions that were to strengthen and give form to the constitution's RoN principles were not created. The government ignored this process as it focused on expanding mining. After their legal challenges to mining failed, RoN activists decided not to pursue secondary laws out of fear of weakening the constitutional provisions. This meant that judges had a great deal of power to interpret and apply the constitution's RoN principles, and this is why the judges' knowledge became so important. The politicization of RoN set the conditions for RoN norm development through the courts.

Ironically, the early politicization of RoN arguably contributed to RoN jurisprudence by raising its profile. While civil society did not win highly

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politicized, high-profile lawsuits, antimining activists used Ecuador's constitutional RoN articles as a tool for mobilizing society and placing RoN on the national agenda, making it a salient issue. The mobilization in response to oil drilling in Yasuní National Park is illustrative.

In 2013, Ecuador's government abandoned its proposal to forgo oil extraction in Yasuní in exchange for international donations to finance alternative development. It then announced plans to initiate new oil drilling in the reserve.[22] In response, RoN activists launched a national social movement named YASunidos. Their media campaign highlighted that drilling in Yasuní would violate the constitutional RoN of Indigenous communities. YASunidos organized a campaign to collect signatures to hold a referendum on whether to block drilling in Yasuní. When the National Electoral Council rejected the signatures, activists sued before the Constitutional Court. The court did not deny electoral fraud, but it also did not mandate a referendum. This outcome increased popular perception that the government's actions were unconstitutional and increased YASunidos' ability to mobilize society against the government.

The result was that RoN became more salient in national discourse. When politicians and bureaucrats discussed development, particularly in mining and oil, they often also discussed RoN. While the national government still pursued development through extractivism, it was forced to justify such activities as consistent with the concept of *buen vivir* and constitutional RoN. This arguably explains why Correa's government repeatedly invoked RoN instrumentally in 2015 to justify and legitimize its policy agenda, including in controversial cases that countered powerful economic actors (e.g., unauthorized miners and shrimp farmers). Ironically, because it always won in those politicized cases, the state played a crucial role in strengthening RoN jurisprudence by accumulating precedent and increasing the knowledge of judges.

The increasing number of successful RoN sentences suggests that judges' knowledge of RoN is expanding, a point confirmed in interviews with lawyers and the judges themselves. Interview data and the legal reasoning presented in judicial sentences show that this is largely due to the combination of high-profile cases brought by the state and civil society's efforts to work below the radar to accumulate precedent through low-profile cases. To our surprise, knowledge among judges opened a pathway

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for applying RoN that we did not initially consider. As judges gain more understanding of RoN, they become agents in the development of RoN norms and jurisprudence, not because they are norm entrepreneurs but because of their professional requirements to interpret the law in its entirety, forcing them to grapple with the relationship between RoN and human cultural and economic rights. The fact that Ecuadorian judges apply RoN to cases that were not initially about RoN is evidence that RoN norms are strengthening in the judicial system. This is another way that Ecuador's allegedly "weak" (i.e., not fully implemented) RoN laws have mattered.

Ecuador's growing caseload and strengthening of RoN jurisprudence suggest pathways toward successful implementation in other states seeking to codify RoN. Ecuador's experience shows that even in states with extractivist policies and economies, RoN has the potential to (1) emerge as a right equal to human rights and (2) change the development dynamic to include a more biocentric approach. In Ecuador, despite its extractivist development agenda, placing RoN as a constitutional right has heightened its importance and called the legal community, judges, and civil society to reframe decisions in terms of living in harmony with Nature rather than strictly in anthropocentric terms. Ecuador's RoN legal decisions have been cited in courts around the world, illustrating how domestic norm construction processes have international implications.

Of course, it is not inevitable that "weak" RoN laws will strengthen over time. Chapter 5 analyzes why Bolivia, a state with similar RoN laws and seemingly similar potential, has not implemented RoN.

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